STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

In re: Request for Regulatory Determination filed by BUTTE COUNTY MOSQUITO AND VECTOR CONTROL DISTRICT concerning (1) a Memorandum related to "Region II Streambed Alteration Notification Agreement Information," and its attachments and (2) "Syllabus for Stream and Lake Alterations Under Sections 1601-1603 California Fish and Game Code" issued by DEPARTMENT OF FISH AND GAME	1998 OAL Determination No. 4 [Docket No. 90 - 049] May 22 , 1998 Determination Pursuant to Government Code Section 11340.5; Title 1, California Code of Regulations, Chapter 1, Article 3

Determination by: EDWARD G. HEIDIG, Director
HERBERT F. BOLZ, Supervising Attorney
LINDA A. FRICK, Senior Staff Counsel
Regulatory Determinations Program

SYNOPSIS

The issue presented is whether documents related to streambed alterations issued by the Department of Fish and Game contain "regulations" and are therefore without legal effect unless adopted in compliance with the Administrative Procedure Act ("APA").

The Office of Administrative Law has concluded that the documents contain "regulations" required to be adopted pursuant to the APA.

THE ISSUE PRESENTED[1]

The Office of Administrative Law ("OAL") has been requested[2] to determine[3] whether the (1) Memorandum[4] of October 30, 1989 related to "Region II Streambed Alteration Notification Agreement Information (Fish and Game Code Sections 1601-1607)," and its attachments[5] and (2) "Syllabus for Stream and Lake Alterations under Fish and Game Code Sections 1601-1603" contain "regulations" required to be adopted pursuant to the APA.[6],[7] For convenience, the words "document(s)" or "materials" refer inclusively to all of the materials challenged by Butte County Mosquito Abatement District: the "Memorandum" (the memorandum and its other attachments) and the "Syllabus."

THE DECISION[8],[9],[10],[11]

The Office of Administrative Law finds that:

1. The APA is generally applicable to the Department of Fish and Game.

2. The contents of the documents had general applicability and made the terms of Fish and Game Code Sections 1601 and 1603 specific.

3. No general exceptions to the APA requirements apply to the documents.

4. The documents contain provisions which violate Government Code section 11340.5, subdivision(a).

ANALYSIS

I. BACKGROUND

A. The State Agency

The Department of Fish and Game is part of the Resources Agency of the State of California. The Department was established by the Legislature in 1951 as part of the Charles Brown Fish and Game Reorganization Act.[12] It is to be distinguished from the Fish and Game Commission ("Commission"), which was established by Article IV, section 20(b) of the California Constitution. The Department is charged with the administration and enforcement of the California Fish and Game Code,[13] while general policies for the conduct of the Department are formulated by the Commission.[14]

Fish and Game Code Sections 1601[15] and 1603[16] provide that for the protection of fish and wildlife, all government agencies and persons intending to alter certain streambeds must enter into an agreement with the Department of Fish and Game describing measures which will protect fish and wildlife.

B. The Request for Determination

1. This Request

This request[17] for determination was submitted by the Butte County Mosquito Abatement District ("District"). The District requests a determination as to whether the documents described below are "regulations."

2. Description of the documents challenged in the request

For the most part the documents describe measures to be taken to protect fish and wildlife when the streambed they use is to be altered.

"Region 2 Streambed Alteration Policy and Procedures October 1989"

The cover page of the first set of the challenged rules specifically identifies itself as "Region 2 Streambed Alteration Policy and Procedures October 1989." The

first page of the document is a one page Memorandum dated October 30, 1989 addressed to "Functional Supervisors, All Wildlife Protection Personnel, District Fisheries Biologists, Unit Wildlife Managers" from "Department of Fish and Game - Region 2" signed by James Messersmith, Regional Manager. The purpose of the Memorandum (see endnote 4), and the information enclosed with it, is to "*clarify operational guidelines*" for and "*provide a consistent approach*" to the Streambed Alteration Agreements in Region 2. The October 30, 1989 Memorandum states that all Streambed Alteration:

> "agreements should be written within these *guidelines*. Exceptions will need specific justification. Also included is *additional back-up information* which will clarify these guidelines and will assist you in completing the agreements." [Emphasis added.]

The "guidelines" referred to in the Memorandum apparently refer to the six page, 32 paragraph document ("guidelines") attached to the Memorandum. The "back-up information" apparently refers to the "attachments" referenced at the end of the "guidelines." The attachments are listed in endnote 5.

Examples of "guidelines" of concern to the District include Item 13 on page 2 of the "guidelines," which reads:

> "All crossings that remain in place after October 15 must be capable of passing a 50-year flood event. This is generally consistent with the Department of Forestry standards for timber harvests."

Item 14, which reads:

> "All crossings and other structures must not hinder trout or anadromous fish movement."

Item 31b, which reads:

> "Gravel extractions shall generally be of the skimming type, shall occur above the water line, and shall provide for protection of riparian/wetland vegetation.

"Field Guide to Streambed Alteration Agreements"

The Memorandum goes on to refer to the "Field Guide to Streambed Alteration Agreements" prepared by Region 3 staff which

> "should be used within the constraints of the attached guidelines. Where differences occur, the attached guidelines for Region 2 shall be used."

In fact, the so-called "Field Guide" prepared by region 3 is actually entitled "Syllabus for Stream and Lake Alteration under section 1601-1603, California Fish and Game Code" ("Syllabus") and is dated February 1981.

II. DISCUSSION

A. IS THE APA GENERALLY APPLICABLE TO THE DEPARTMENT OF FISH AND GAME?

For purposes of the APA, Government Code section 11000 defines the term "state agency" as follows:

> "As used in this title [Title 2. Government of the State of California (which title encompasses the APA)], 'state agency' includes every *state* office, officer, *department*, division, bureau, board, and commission." [Emphasis added.]

The APA further clarifies or narrows the definition of "state agency" from that in Section 11000 by specifically excluding "an agency in the judicial or legislative departments of the state government."[18] The Department is in neither the judicial nor legislative branch of state government.[19] Clearly, the Department is a "state agency" within the meaning of the APA. Unless the Department is *expressly exempted* from the APA,[20] the APA is generally applicable to the Department. Since no specific exemption has been enacted, the APA is generally applicable to the Department.[21]

B. DOES THE CHALLENGED RULE CONSTITUTE A "REGULATION" WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?

Government Code section 11342, subdivision (g), defines "regulation" as:

> ". . . *every rule*, regulation, order, or standard of general application *or the amendment, supplement or revision of any rule*, regulation, order or standard *adopted* by any state agency *to implement, interpret, or make specific the law enforced or administered by it*, or to govern its procedure . . . [Emphasis added.]"

Government Code section 11340.5, authorizing OAL to determine whether agency rules are "regulations," provides in part:

> "(a) *No state agency shall issue*, utilize, enforce, or attempt to enforce ***any guideline***, criterion, bulletin, *manual, instruction*, order, ***standard of general application, or other rule***, which is a [']regulation['] as defined in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the *APA*] . . . . [Emphasis added.]"

In *Grier v. Kizer*,[22] the California Court of Appeal upheld OAL's two-part test[23] as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a "regulation" and *not* subject to the APA. In applying the two-part test, however, we are mindful of the admonition of the *Grier* court:

> ". . . because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]"[24]

It might be argued that the guidelines and syllabus merely provide a number of possible procedures in given situations, do not establish mandatory procedures but merely provide information. Therefore, the *"guideline"* and *"syllabus"* would not be "regulations." However, that position overlooks the *plain* language of the APA which includes "*guideline*, criteria, bulletin, *manual*, *instruction*, order, standard of general application, or other rule, . . ." as items that may constitute regulations.[25] *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (*"SWRCB v. OAL"*) (1993)[26] made clear that reviewing authorities focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency.

> ". . . [T]he . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it*. . . ." (Emphasis added.)

What "label" is given to the rule by the Department and whether the rule is described as "mandatory"[27] are not dispositive on the question of whether a rule is a "regulation." The two-pronged analysis described in *Grier*, above, which defines a "regulation," is the appropriate analysis to determine whether the contents of the challenged documents are subject to the APA.

1. Is the challenged rule either a rule or standard of general application or a modification or supplement to such a rule?

For an agency policy to be of "general application," it need not apply to all citizens of the state. It is sufficient if the rule applies to members of a class, kind

or order.[28] The Memorandum requires Region 2 staff to apply the guidelines to *all* members of the class of entities or persons who enter into a Streambed Alteration Agreement pursuant to Fish and Game Code sections 1601 and 1603. Furthermore, the purpose of the Memorandum's circulation and instruction that the guidelines "should" be used was to bring consistency to the agreements being negotiated in Region 2. Just as in *Tidewater Marine Western, Inc. v. Bradshaw*[29] (1996), where the California Supreme Court found a policy to be a rule of general application, the policies at issue here are expressly intended to guide the regions statewide and bring consistency to all agreements entered into in the state.

Therefore, the instruction to staff to apply the policies in the documents to *all* persons and government entities which must or want to alter a streambed, indicates the documents contain rules of general application.[30]

2. Have the challenged rules been adopted to implement, interpret or make specific the law enforced by the agency or govern the agency's procedure?

The documents' contents implement, interpret and make specific the general requirements of Fish and Game Code Sections 1601 and 1603 (for text, see endnotes 15,16). These statutes limit the authority of a governmental entity or person to alter a streambed without either: (1) the Department's finding that no fish or wildlife may be substantially affected or (2) by entering into a Streambed Alteration Agreement with the Department providing for measures to protect the fish and wildlife.[31] The language in the statute does not specify what should be in the agreements, what "substantially adversely affected" means, or what measures are appropriate for protection, but leaves it up to the Department to see that public policy is carried out.[32] The Memorandum, however, and the attachments and the Field Guide (or Syllabus) interpret and make specific what should be in the agreement. One example in the guidelines, Item 31c, specifies that:

> "Gravel extractions in anadromous fish and trout spawning areas shall be opposed unless it can be shown that no adverse effects will result, or are for the purposes of fisheries enhancement, flood protection or levee maintenance."

This direction to the Department's Regional staff makes specific what "substantially adversely affected" means in anadromous fish and trout spawning areas by prohibiting gravel extractions unless specific exceptions are met.

The Syllabus contains detailed instructions on appropriate ways to change the structure of a streambed or area around a bridge. The directions make specific what type of protective measures are necessary when altering streambeds in particular circumstances. If these measures are not implemented in accordance with these instructions or other requirements, the Department can prevent an alteration to a streambed or area around a bridge. The specificity included in these two examples are found nowhere in the Fish and Game Code sections. The documents contain material which interprets and makes specific or "embellishes upon" the requirements of sections 1601 and 1603 protecting fish and wildlife when altering streambeds.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in

> "a statutory scheme which the Legislature has established. . . ."[33]

> "But to the extent that any of the [agency rules] depart from, or *embellish* upon express statutory authorization and language, the [agency] will need to promulgate regulations . . . ." [34] [Emphasis added.]

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations provisions) cannot legally be "embellished upon" in administrative bulletins.[35]

To the extent that provisions in the "guidelines" attached to the Memorandum or the contents of the other attachments or Syllabus simply repeat existing law,[36] then the provisions do not interpret, implement, or make specific the law. However, the Department has not demonstrated which, if any, sections of the Memorandum repeat or restate specific provisions of law which were in existence at the time the Memorandum was issued. The District seems to indicate that several guidelines have their basis in Department of Forestry requirements; however, there is no specific reference in the materials to those statutes or regulations. OAL can find no specific guidelines within sections 1601 or 1603 and, therefore, for purposes of this determination, finds that this material does interpret and "embellish" upon what is in the statute.

According to the California Court of Appeal in *Union of American Physicians & Dentists v. Kizer* (1990) :

> "an informal rule which creates a presumption and then indicates how to rebut it is a regulation within the meaning of the APA."[37]

The Memorandum is clear that *all agreements* are subject to the guidelines contained in the material *unless express justification* is given for any variance. The instruction to the regions created a presumption that the streambed alterations were to occur only in certain circumstances and be done in certain ways unless the applicant were to persuade the Department to accept an alternative approach. Under the holding of *Union of American Physicians & Dentists*, the documents contain materials which are subject to the APA. The challenged rules, therefore, contain "regulations" within the meaning of Government Code 11342

C. DO THE CHALLENGED RULES FOUND TO BE "REGULATIONS" FALL WITHIN ANY ESTABLISHED *GENERAL* EXCEPTION TO APA REQUIREMENTS?[38]

All "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute,[39] as discussed above, or unless the conditions of a general exception are met. The information contained in the documents is so comprehensive that individual passages may fall within a particular exception. The Department did not bring to OAL's attention any examples from the comprehensive material which arguably fall within an applicable APA exception. Nonetheless, this determination will discuss the potential general exceptions which may apply to particular passages, though clearly not applying to the documents as a whole.

Although the Department did not submit a response that complied with legal requirements, OAL's independent review, as set forth below, discloses no applicable exceptions.[40] Neither did the Department demonstrate that the challenged rules have been adopted pursuant to the APA.[41]

A. Internal Management

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

"'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret or make specific the law enforced or administered by it, or to govern its procedure, *except one that relates only to the internal management of the state agency.*" (Emphasis added.)

A review of relevant case law[42] demonstrates that the "internal management" exception has been narrowly construed.[43] It applies only if the "regulation" under review: (1) affects *only the employees of the issuing agency, and (2) does not address a matter of serious consequence involving an important public interest.*[44] [Emphasis added.]

The challenged materials are so comprehensive that parts may fall into the internal management exception. However, generally, the "guidelines" *direct* a variety of *employees of the issuing agency* (the Department) as to which proposals would be acceptable for inclusion in Streambed Alteration Agreements entered into with the general public and governmental entities. The policies in the documents ***affect the public***--individuals, public entities and groups outside of the agency--persons who are interested in the protection of fish and wildlife and/or the alteration of streambeds. The "guidelines" do not affect merely the employees of the issuing agency. The policies emphasized in the District's request have nothing to do with internal affairs of the Department, but with implementing important legislative policies on a statewide basis to protect and conserve the fish and wildlife resources of California in the streambed alteration context.

B. Specifically named persons

An exception in Government Code Section 11343(a)(3) exists for a rule which is "directed to a specifically named person or to a group of persons *and [which] does not apply generally throughout the state.*" However, Fish and Game sections 1601 and 1603 apply broadly to all government entities and all persons who alter a streambed and not to any specifically named person.

C. Contracts

Provisions of a contract, which are rules of general applicability interpreting a statute (or a regulation), are not shielded from APA challenge. (See endnote 39(f)) There is no express statutory language which provides that agency rules placed in

contract provisions are exempt from the APA. Applying Government Code section 11346, which requires that exemptions be expressly stated in statute, OAL concludes that there is no contract exemption.

In addition, it appears the Legislature intended that there be no general exemption for contract provisions. Exempting rules found in public contracts was--and is--a clear policy alternative. The federal APA, first enacted in 1946, exempted "*matter relating to* agency management or personnel or to public property, loans, grants, benefits or *contracts*" (emphasis added) from rulemaking requirements.[45] In enacting the California APA in 1947, the Legislature rejected a proposal to exempt "any interpretative rule *or any rule relating* to public property, public loans, public grants or *public contracts*" (emphasis added) from APA notice and hearing requirements.[46],[47] It therefore seems that the 1947 Legislature considered and rejected the idea of following the federal example of exempting rules contained in public contracts from notice and comment requirements.

Perhaps the California Legislature reasoned that providing an exemption for contract provisions would not be consistent with the basic goals of the APA--i.e., to provide for meaningful public participation in agency decision making. The APA provides that all parties affected by proposed rulemaking be given the right to hearing and an opportunity to comment on the proposed rules. The right to comment would be nullified if an agency were permitted to avoid formal adoption of a rule merely by incorporating it into a contract. While the rights of parties to a contract may be limited by the terms of the contract, it is inherently unjust for such terms to restrict the rights of parties not subject to the contract.[48]

The primary purpose of the Streambed Alteration Agreements is not to protect the rights of the parties to the Streambed Alteration Agreements, but to protect the public interest. Therefore, even if an argument could be made that no public policy is served in regulating the negotiations between an individual and a state agency related solely to the parties' rights, those facts are not present here. That is not to say that a specific Streambed Alteration Agreement, or that all provisions in such an agreement must meet the requirements of the APA. In fact, each specific agreement with a specific entity to cover specific proposals to protect and conserve the particular fish and wildlife in a particular stream probably does fall within an exception. However, that is not the issue presented here. The issue in this determination is whether broad guidelines which *all* agreements, statewide, either must meet or specifically justify variances therefrom, must be adopted pursuant to the APA.

D. Forms

Government Code section 11342(g) excludes from the definition of "regulation":

> "any *form* prescribed by a state agency or any instructions relating to the use of the form, *but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.*" (Emphasis added.)

The limits to the "form"exception have been well covered in a previous Determination.[49] With respect to the scope of the "form exception," OAL has said the following:[50]

> "If a form or form instruction contains 'regulations' within the meaning of Government Code section [11342], subdivision (b), those 'regulations' must be adopted pursuant to the APA. In other words, if a form contains uniform, substantive rules which were adopted in order to implement a statute, those rules must be promulgated in compliance with the APA. According to the California Court of Appeal for the First District, the '. . . statutory exemption relate[es] to *operational forms*.' (Emphasis added.) [51] There is no requirement that an agency adopt a form as a regulation when that form simply provides an operationally convenient place in which applicants for licenses can, for instance, write down information which existing provisions of law already require them to furnish to the licensing agency. By contrast, if an agency form goes beyond existing legal requirements, if that form contains *uniform, substantive* provisions which in essence make new law, then, under Government Code section 11342, subdivision (b), a formal regulation is 'needed to implement the law under which the form is issued.'"

Some of the "attachments" described in endnote 5 may be considered forms by the Department. To the extent the provisions in the forms restate what is in statute, case law or regulation and the Department can point to those laws, the forms in the challenged material are not indeed subject to the APA. However, to the extent that the forms include any material which does more than simply restate existing law, but interprets, implements or makes the law specific, then the "form" is subject to the APA.

In that (1) the Fish and Game Code statute related to streambed alteration is vague, (2) there were no Department regulations on point at the time the request was filed and (3) the Department did not argue the "forms" exception, OAL is not going to make any specific findings with respect to each sentence in the forms. Suffice it to say that some of the statements may be excepted; however, insofar as the forms contain "uniform substantive" rules to implement the statute, consistent with the California Court of Appeal's holding in the case of *Stoneham v. Rushen*,[52] the "form" or the "substantive" rules must independently be adopted pursuant to the APA.

IV. CONCLUSION

For the reasons set forth above, OAL finds that:

1. The APA is generally applicable to the Department of Fish and Game.

2. The contents of the documents had general applicability and made the terms of Fish and Game Code Sections 1601 and 1603 specific.

3. No general exceptions to the APA requirements apply to the documents.

4. The documents contain provisions which violate Government Code section 11340.5, subdivision(a).

DATE: May 22, 1998

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ENDNOTES

1. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to **1986 OAL Determination No. 1** (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations) (see endnote 3: *Grier* disapproved on other grounds in *Tidewater*).

In August 1989, a second survey of governing case law was published in **1989 OAL Determination No. 13** (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a third survey of governing case law was published in **1990 OAL Determination No. 12** (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11340.5, and the other opinion issued thereafter.

In January 1992, a *fourth* survey of governing case law was published in **1992 OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

In December 1993, a *fifth* survey of governing law was published in **1993 OAL Determination No. 4** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, No. 2-Z, page 61, note 3.

In December 1994, a *sixth* survey of governing law was published in **1994 OAL Determination No. 1** (Department of Education, December 22, 1994, Docket No. 90-021), California Regulatory Notice Register 95, No. 3-Z, page 94, note 3.

Authorities discovered since the sixth survey:

Tidewater Marine Western, Inc. v. Bradshaw (1996) 14 Cal.4th 557, 59 Cal.Rptr.2d

186 concerned an allegation that a manual provision issued by the Division of Labor Standards Enforcement was an underground regulation.

The underlying regulatory scheme is unusual: in the early twentieth century, the Legislature delegated substantial quasi-legislative power to the Industrial Welfare Commission ("IWC") to adopt rules governing wages and conditions of employment. After World War II, and the enactment of the APA, the Legislature exempted the IWC from APA rulemaking requirements, permitting it to continue using its traditional rule adoption procedures. The rules adopted pursuant to this cumbersome though venerable process, usually referred to as wage orders, are printed in the California Code of Regulations (Title 8), though these IWC rules--unlike most of the regulations printed in the CCR--are *not* subject to the usual APA adoption procedures. Seldom amended and broadly drafted, these IWC rules function not unlike statutes.

These rules are not enforced by the IWC, but rather by an entirely separate agency, the Division of Labor Standards Enforcement, which routinely interprets, implements, and applies them to specific cases. Unfortunately, there is no statutorily prescribed notice and comment procedure which applies to DLSE interpretations of IWC wage orders. In any event, it would make little sense for one agency (DLSE) to enter into a public notice and comment process to adopt rules intended to interpret a second agency's regulations (the IWC wage orders). It seems unlikely that one agency can formally adopt regulations implementing a second agency's formally adopted regulations.

The *Tidewater* opinion contains a significant discussion of quasi-judicial precedent decisions. Also, several months after the opinion was filed, an express statutory exemption covering precedent decisions became effective.

OAL's position since 1986 has been that, absent an express statutory exemption from the APA, agency precedent decision systems violate the APA. Government Code section 11346; **1993 OAL Det. No. 1** (California Energy Commission, April 6, 1993, Docket No. 90-015), CRNR 93, NO. 16-Z, April 16, 1993, p. 413), cited in official comment to Gov. Code sec. 11425.60; *California Public Agency Practice*, sec. 20.06, esp. [4]. Under the law as it existed until July 1, 1997, a general rule developed in a quasi-judicial proceeding could not be used from that point on in similar factual settings in lieu of a duly adopted regulation unless the rule had first been adopted as a regulation. The new statutory provision, Government Code section 11425.60, took effect on July 1, 1997. (The *Tidewater* opinion was filed December 19, 1996, over six months before the new provision went into effect.)

Government Code section 11425.60 had the effect of legalizing the use of precedent decisions, if certain conditions were met. The *Tidewater* court does not cite section 11425.60. Several portions of *Tidewater* might well have been drafted differently, had the court taken enactment of section 11425.60 into account. For instance, the following passage must be read with the knowledge that it appears to have been written without considering the significance of section 11425.60:

> "[i]nterpretations that arise in the course of case-specific adjudication are not regulations, though they may be persuasive as *precedents* in similar subsequent cases. [citations] . . . Thus, if an agency prepares a policy manual that is no more than a restatement or summary, without commentary, of the agency's prior decisions in specific cases, . . ., the agency is not adopting regulations." (59 Cal.Rptr.2d at 194; emphasis added.)

The quoted passage likely cannot be reconciled with Government Code section 11425.60. This statute creates an express APA exemption. It supersedes prior statutory and decisional law. Looking at an example of how the new statute might apply, let us consider a policy manual containing the following sort of rule: decision 89-1 (a spouse who resigns a job in order to move to another city with the other spouse is not entitled to unemployment benefits). An issuance of a rule first developed in a quasi-judicial proceeding would violate Government Code section 11340.5. It would not matter if the decision were restated without commentary: the statement of the decision by itself contains a prospectively applicable standard of general application. However, the issuing agency could under section 11425.60 elect to designate it as a precedent decision. If this were done, the decision could be freely written up in departmental publications and could be used in lieu of a duly adopted regulation.

2. This Request for Determination was filed informally by the Pacific Legal Foundation on August 29,1990 on behalf of the Butte County Mosquito Abatement District. On November 1, 1990 the formal request was filed by the District. Supplemental material was received on November 19, 1990. The District contact is James Camy, Manager, Butte County Mosquito Abatement District, 5117 Larkin Road, Oroville, CA 95965, (916) 533-6038.

A response, received April 1, 1997 from the Department of Fish and Game, 1416 Ninth Street, P.O. Box 944209, Sacramento, CA 94244-2090, (916) 654-3821, did not meet the requirements of Title 1, California Code of Regulations, section 125, paragraph (c) and, therefore, cannot be considered.

No public comments were received in response to the Notice published in the California Regulatory Notice Register ("CRNR") 97, Volume No.8-Z, February 21, 1997.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

> "'*Determination*' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless
>
> > (1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA." (Emphasis added.)

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*"). We note that a 1996 California Supreme Court case stated that it "disapproved" of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to "the two-part test of the Office of Administrative Law," citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

4. Unless otherwise specified, the word "Memorandum" refers to the one page document dated October 30, 1989, the six page, 32 paragraph document attached and material referenced as "Attachments" (see endnote 5 for list of "Attachments") at the end of the six page, 32 paragraph document. The word "Syllabus" refers to the Syllabus for Stream and Lake Alterations under Sections 1601-1603 California Fish and Game Code. The word "Document(s)" or "materials" refer inclusively to all of the materials challenged by Butte County Mosquito Abatement District: the "Memorandum" (the memo and its other attachments) and the "Syllabus."

5. The attachments which are referred to at the end of the six page, 32 paragraph document are (1) *Fee Schedule* (two pages, effective July 1, 1989, signed by Pete Bontadelli, Director), (2) *Std. Time extension forms (a.) Review period* (one page identified at bottom as "(30-Not. Ext. Rev. 8/89 C:\WPS\PROCED\35), (3) *Agreement Renewal* (one page identified at bottom as "(Renewal Rev. 8/89 C:\WPS\PROCED\36)," (4) *Caltrans MOU* (three page memorandum dated August 31, 1987, addressed to Mr. W. E. Schaefer, Deputy Director, Department of Transportation, regarding Caltrans/Department of Fish and Game Procedures for issuing 1601s, signed by Pete Bontadelli, Acting director; two page document dated April 21, 1987 to Pete Bontadelli, Chief Deputy Director, regarding Caltrans/Department of Fish and Game Procedures for Issuing 1601s, signed by E. V. Toffoli, Legal Advisor; one page Notice and Verification beginning "Contractor is aware"), *(5) DWR MOU* (two page Memorandum of Understanding Between Department of Fish and Game and Department of Water Resources regarding Streambed Alteration Notification and Maintenance Activities under Fish and Game Code Section 1601 and a one page Attachment "A"); *(6) Caltrans Seeding Guide for California* (fifteen pages, including the cover of the seeding guide, "By Major Land Resource Area, Developed for The California Division of Highways, as part of the Plant Materials Study, by United States Department of Agriculture Soil Conservation Service, Lockeford,

California, George Edmunson, Project Leader, 1-2-73); (7) *Fish passage information* (a cover page and three pages out of a booklet called "Fish Migration and Fish Passage, Practical Guide to Solving Fish Passage Problems"; a two-page letter dated April 7, 1986 to Miles Skinner, Resident Engineer, Caltrans, signed by Paul T. Jensen, Regional Manager; a one page document entitled "Tributaries to the North Fork Feather River Found to Support Significant Numbers of Adult Migrating Trout," and, (8) *Flood control agency MOU* (two page Memorandum dated October 29, 1987 to Region 1, 2, 3, 4, 5, IFD, WPD, Legal Unit, from Department of Fish and Game signed by Pete Bontadelli, Acting Director, and an attached seven page "Memorandum of Understanding between the California Department of Fish and Game (Department) and the [insert the name] Flood control Agency) regarding Streambed Alteration Notification and Maintenance Activities subject to Fish and Game Code Section 1601" and a two page "Attachment A" to the sample MOU entitled "Those Activities which may Constitute Routine Maintenance").

6. This determination may be cited as **"1998 OAL Determination No. 4."**

7. According to Government Code section 11370:

> "*Chapter 3.5* (commencing with Section 11340), *Chapter 4* (commencing with Section 11370), *chapter 4.5* (commencing with Section 11400), *and Chapter 5* (commencing with Section 11500) *constitute*, and may be cited as, *the Administrative Procedure Act*." [Emphasis added.]

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Administrative Regulations and Rulemaking") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.

The rulemaking portion of the APA and all OAL regulations are both reprinted and indexed in the annual APA/OAL regulations booklet "**California Rulemaking Law**," which is available from OAL (916-323-6225). The February 1997 revision is $3.50 ($6.40 if sent U.S. Mail).

8. The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244 (see endnote 3: *Grier*, disapproved on other grounds in *Tidewater*). Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987), CRNR 96, No. 8-Z, February 23, 1996, p. 293. The *Grier* court concurred with OAL's conclusion, stating that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted to the court for consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of [a statute] by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due consideration.*" [Id.; emphasis added.]

See also *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886 (same holding) and note 5 of **1990 OAL Determination No. 4** (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384 (reasons for according due deference consideration to OAL determinations).

9. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.

10. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

11. Government Code section 11340.5, subdivision (d) provides that:

"Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published."

12. Stats. 1951 c. 715, section 4; c. 1613, section 28 and Stats. 1957, c. 456, p. 1326, section 700.

13. Fish and Game Code section 702.

14. Fish and Game Code section 703.

15. Fish and Game Code section 1601 (this quote is the version which was in place at the time the request was filed; subsequent changes are not significant to OAL's analysis) provides in part:

"Except as hereinafter provided, general plans sufficient to indicate the nature of a project for construction by, or on behalf of, any governmental agency, state or local, and any public utility, of any project which will divert, obstruct or change the natural flow or bed, channel or bank of any river, stream or lake designated by the department in which there is at any time an existing fish or wildlife resource or from which these resources derive benefit, or will use material from the streambeds designated by the department, shall be submitted to the department. When an existing fish or wildlife resource may be substantially adversely affected by such construction, the department shall notify the governmental agency or public utility of the existence of such fish or wildlife resource together with a description thereof and will propose reasonable modifications in the proposed construction as would allow for the protection and continuance of the fish or wildlife resource, including procedures to review the operation of such protective measures.

. . .

Agencies or public utilities proposing projects affected by this section shall not commence such operations until the department has found that such project will not substantially adversely affect an existing fish or wildlife resource or until the department's proposals, or the decisions of a panel of arbitrators, have been incorporated into such projects.

The department shall determine and specify types of work, methods of performance or remedial measure which shall be exempt from the operation of this section.

With regard to any project which involves routine maintenance and operation of water supply, drainage, flood control, or waste treatment and disposal facilities, notice to and agreement with the department shall not be required subsequent to the initial notification and agreement unless the work as described in the agreement is substantially changed, or conditions affecting fish and wildlife resources substantially change, and such resources are adversely affected by the activity conducted under the agreement. This provision shall be applicable in any instance where notice to and agreement with the department has been attained prior to the effective date of this act.

. . ."

16. Fish and Game Code section 1603 (this quote is the version which was in place at the time the request was filed; subsequent changes are not significant to OAL's analysis) provides in part:

"It is unlawful for any person to substantially divert or obstruct the natural flow or substantially change the bed, channel, or bank of any river, stream or lake designated by the department, or use any material from the streambeds, without first notifying the department of such activity, except when the department has been notified pursuant to Section 1601.

. . .

It is unlawful for any person to commence any activity affected by this section until the department has found it will not substantially adversely affect an existing fish or wildlife resource or until the department's proposals, or the decisions of a panel of arbitrators, have been incorporated into such projects. If the department fails to act within 30 days of the receipt of the notice, the person may commence such activity.

It is unlawful for any person to engage in a project or activity affected by this section, unless such project or activity is conducted in accordance with the department's proposals or the decisions of the panel of arbitrators.

With regard to any project which involves routine maintenance and operation of water supply, drainage, flood control, or waste treatment and disposal facilities, notice to and agreement with the department shall not be required subsequent to the initial notification and agreement unless the work as described in the agreement is substantially changed, or conditions affecting fish and wildlife resources substantially change, and such resources are adversely affected by the activity conducted under the agreement. This provision shall be applicable in any instance where notice to and agreement with the department have been attained prior to the effective date of this chapter"

. . ."

17. *OAL does not review alleged underground regulations for compliance with the APA's six substantive standards*

The District's letter not only challenges the Documents as failing to comply with the APA, but also challenges the appropriateness of having "operational standards adopted by a Regional memorandum which seem to conflict and abridge the statutory authority of another agency of government." The "conflict" referred to is a disagreement in the application of the statutes which govern Mosquito Abatement Districts generally (Health and Safety Code Section 2200 et. seq., particularly Article 4 beginning at Section 2270, District Powers) and the Fish and Game Code sections 1601 and 1603.

The alleged conflict between the two Codes is not addressed in this Determination. OAL's specific authority under Government Code Section 11340.5 (underground regulations) under which this letter has been submitted for OAL's consideration, limits OAL review to whether the state agency must follow the requirements of the rulemaking portion of the APA before issuing the documents.

In the event regulations were issued by the Department under the APA, OAL would review the proposed regulations. The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL *does not* review alleged "underground regulations" to determine whether they meet the six substantive standards applicable to regulations proposed for formal adoption.

18. Government Code section 11342, subdivision (a).

19. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 175 Cal.Rptr. 744, 746- 747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

20. Government Code section 11346; Title 1, CCR, section 121 (a) (2).

21. In addition, the Fish and Game Code in section 702 specifically requires the Department's "regulations" to be adopted pursuant to the APA. However, when the Request for Determination was filed, the Department did not appear to have general regulatory authority, although the Commission had general rulemaking authority pursuant to section 200 of the Fish and Game Code. There was one reference to "rulemaking" power in 1989 with respect to the fee schedule, which was one of the "attachments" to the Memorandum. Commencing with the 1982/3 fiscal year, Fish and Game Code section 1607 specified that the director could establish a schedule of fees. There was no express exemption from the APA in that statute. In January of 1997 Section 702 of the Fish and Game Code was amended to state:

> "This code shall be administered and enforced through regulations adopted only by the department, except as otherwise specifically provided by this code or where this code requires the commission to adopt regulations."

Which agency, and whether rulemaking authority exists would only become relevant if the agency were to attempt to formally adopt regulations pursuant to the APA or was subject to an express exemption from the APA. Since there was no express exemption in the statute and authority to adopt the regulations is not an issue in this determination it is not necessary to reach a conclusion as to which agency, if any, had authority to regulate the Streambed Alteration Agreements in 1989. Suffice it to say that in the event the Department chooses to adopt regulations implementing 1601 or 1603 after this determination issues, the Department has that power and is expressly subject to the APA

at this time.

22. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251 (see endnote 3: *Grier*, disapproved on other grounds in *Tidewater*).

23. The *Grier* Court stated:

> "The OAL's analysis set forth a two-part test: 'First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency's procedure?' (1987 OAL Determination No. 10, *supra*, slip op'n., at p. 8.)" (see endnote 3: *Grier*, disapproved on other grounds in *Tidewater*).

OAL's wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in California Regulatory Notice Register 98, No. 8-Z, February 23, 1996, p. 292.

24. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253 (see endnote 3: *Grier*, disapproved on other grounds in *Tidewater*).

25. Government Code section 11340.5.

26. 12 Cal.App.4th 697, 702, 16 Cal. Rptr.2d 25, 28.

27. Whether a "rule" is "binding," "mandatory" or "advisory" makes no difference to the legal analysis if the rule otherwise meets the two-prong test -- is it applied generally and does it implement, interpret or make specific the law. For further discussion see **1986 OAL Determination No. 2**, pp. 11-13 (third argument) (California Coastal Commission, April 30, 1986, Docket No. 85-003), CANR 86, No. 20-Z, May 16, 1987, p. B-31, **1986 OAL Determination No. 3**, pp. 9-13, 17, (State Board of Equalization, May 28, 1986, Docket No. 85-004), CANR 86, No. 24-Z, June 13, 1986, p.B-10, **1994 OAL Determination No. 1** (thorough discussion of specific parts of "advisory" letters, some of which were determined to be "regulations" and some of which were determined not to be "regulations"), pp.33-38, 46, 56 (State Department of Education, December 22, 1994, Docket No. 90-021) CRNR 95, No. 3-Z, January 20, 1995, p. 95.

28. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

29. 14 Cal.4th 557, 572, 59 Cal.Rptr.2d 186, 195.

30. The holding in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 572, 59 Cal.Rptr.2d 186, 195 applies here. In *Tidewater*, maritime employees challenged a policy of the Division of Labor Standards Enforcement (DLSE) in the Department of

Industrial Relations enforcing a properly adopted regulation (wage order) of the Industrial Welfare Commission (IWC). The court held that the "policy at issue in this case was expressly intended as a rule of general application to guide deputy labor commissioners on the applicability of IWC wage orders to a particular type of employment." The court found that the policy was void because APA procedures were not followed. Also see **1993 OAL Determination No. 5.** (State Personnel Board, December 14, 1993, Docket No. 90-020) CRNR 94, 2-Z, January 14, 1994, p.61 at p.71.

The *Tidewater* court also addressed the issue of case by case adjudication and disapproved *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239,252-253, 211 Cal.Rptr. 792 and *Bono Enterprise, Inc. v. Commissioner* (1995) 32 Cal.App.4th 968,978-979, 38 Cal.Rptr.2d 549 insofar as they were inconsistent with *Tidewater*. The court in *Tidewater* distinguished true case by case adjudications applying a regulation to a particular case as in *Bendix Forest Products Corp. v. Division of Occupational Saf. & Health* (1979) 25 Cal.3d 465, 158 Cal.Rptr. 882, from cases in which the agency applies a blanket interpretation memorialized in a policy manual, intending to apply it in all cases of a particular class or kind. *Tidewater*, 59 Cal.Rptr.2d at 196. Before taking several case by case adjudications and stating a rule learned from them to be applied in the future, an agency must go through the APA process.

The *Tidewater* court found that:

> "A written statement of policy that an agency intends to apply generally, that is unrelated to a specific case, and that predicts how the agency will decide future cases is essentially legislative in nature even if it merely interprets applicable law." (59 Cal.Rptr.2d at 197.)

The court found that the Legislature, not the court, should state when agencies should be free to adopt so-called "interpretive regulations" without following the APA.

Finally, the court refused to give deference to the DLSE's interpretation of the IWC wage orders because in effect that would "permit an agency to flout the APA by penalizing those who were entitled to notice and opportunity to be heard but received neither." *Tidewater*, 59 Cal.Rptr.2d at 198 citing *Armistead* 22 Cal.3d 204.

31. Fish and Game Code section 1600 provides in part:

"The protection and conservation of the fish and wildlife resources of this state are hereby declared to be of utmost public interest. Fish and wildlife are the property of the people and provide a major contribution to the economy of the state as well as providing a significant part of the people's food supply and therefore their conservation is a proper responsibility of the state. This chapter is enacted to provide such conservation for these resources."

32. Fish and Game Code Section 1600 declares that "[t]he protection and conservation of the fish and wildlife resources of this state are hereby declared to be of utmost public interest.

33. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 274.

34. *Id.*, 275.

35. *Union of American Physicians v. Kizer* (1990) 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891, 892.

36. *Grier*, (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244 (see endnote 3: *Grier*, disapproved on other grounds in *Tidewater*).

37. *Union of American Physicians v. Kizer* (1990) 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 892. **1987 OAL Determination No. 10** (pp 18,19) (Department of Health Services, Docket No. 86-016, August 6, 1987), CRNR 96, No. 8-Z, February 23, 1996, p. 293.

38. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

a. Rules relating *only* to the internal management of *the* state agency. (Gov. Code, sec. 11342, subd. (g).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)

c. Rules that "[establish] or [fix] *rates, prices,* or *tariffs.*" (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a *specifically named* person or group of persons *and* which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings *of counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)

f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest) ("*San Joaquin*"); see *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 167

Cal.Rptr. 552 (dictum); *Nadler v. California Veterans Board* (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see *Del Mar Canning Co. v. Payne* (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see *International Association of Fire Fighters v. City of San Leandro* (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable). The most complete OAL analysis of the "contract defense" may be found in **1991 OAL Determination No. 6,** (Department of Developmental Services, October 3, 1991, Docket No. 90-008), CRNR, 91, No. 43-Z, p. 1451, 1458, 1461***; typewritten version, pp. 168-169, 175-177, 197-200. Relying in part on *Grier v. Kizer*, 268 Cal. Rptr. at 253, **1991 OAL Determination No. 6** rejected DDS' contention (which had been based on *San Joaquin*) that a contractual provision cannot be a standard of general application for APA purposes. The primary APA holding of *San Joaquin* was that a "statistical accounting technique" can never be a "regulation" within the meaning of the APA; a possible secondary holding was that a contractual provision previously agreed to by the complaining party is not subject to the APA. *Grier v. Kizer*, upholding **1987 OAL Determination No. 10,** expressly rejected the primary *San Joaquin* holding, noting that this holding appeared to have lost its precedential value due to the subsequent, inconsistent Supreme Court decision in *Armistead*.

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (g), may also correctly be characterized as "exclusions" from the statutory definition of "regulation"--rather than as APA "exceptions." Whether these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless *first* necessary to determine whether the challenged agency rule meets the two-pronged "regulation" test: *if* an agency rule is *either* not (1) a "standard of general application" *or* (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," *then* there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. In *Grier v. Kizer* (1990) 219

Cal.App.3d 422, 268 Cal.Rptr. 244, the Court followed the above two-phase analysis. *Tidewater v. Bradshaw* (1996) 14 Cal.4th 571, 59 Cal.Rptr.2d 186, 194, reaffirmed use of the *Grier* two prong test and relied upon *Union of American Physicians* (1990) 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891, 89 and *Roth* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552, for its further interpretation.

39. Government Code section 11346.

40. There is nothing presented in the record that would indicate that the exception for rates, prices or tariffs or legal opinions of tax counsel (see endnote 39, paragraphs (c)and (e)) could apply here. For that reason, these exceptions are not addressed.

41. OAL has found previously, **1991 OAL Determination No. 4,** p. 85 (Department of Corrections, April 1, 1991, Docket No. 90-006), CRNR 91, No. 27-Z, July 5, 1991, p. 910, however, that subsequent laws or actions (e.g., rescission of the policy) by the agency do not alter the obligation of OAL under its own regulations (Title 1, CCR, sections 123 & 126) to issue a determination based upon the law and facts at the time the request was filed.

Like any other state agency, OAL is bound to follow its own regulations. See *Memorial, Inc. v. Harris* (9th Cir. 1980) 655 F.2d 905, 910, n. 14.

The fact that a document is no longer in effect does not relieve OAL of its obligation to issue a Determination. See **1990 OAL Determination No. 6,** pp. 152-153 ((Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), CRNR 90, No. 13-Z, March 30, 1990, p. 496.) Also see **1991 OAL Determination No. 6, 156** (Department of Developmental Services, October 3, 1991, Docket No. 90-008), CRNR 91, No. 43-Z, October 25, 1991, p. 1451 in which the Department of Developmental Services argued:

> "that since RCO 89-8 and RCO 88-31 are no longer in effect, a determination as to whether those rules should have been adopted pursuant to the APA is moot. *We disagree*. Parties required to comply with rules established by those RCOs are entitled to a Determination of whether or not those RCOs were valid and enforceable. . ."[Emphasis added.] [Citation to **1990 OAL Determination No. 6,** pp. 152-153 ((Department of Education, Child Development Division, March 20, 1990, Docket No. 89-012), CRNR 90, No. 13-Z, March 30, 1990, p. 496)].

42. *Grier v. Kizer* provides a good summary of case law on internal management (see endnote 3: *Grier*, disapproved on other grounds in *Tidewater*). After quoting Government Code section 11342, subdivision (g), the *Grier* court states:

> "*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state

agencies throughout the state. It interprets and implements [a Board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the Board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and the rules necessary to properly consider the interests of all . . . under the statutes. . . .' [F. omitted.]' . . . [Citation; emphasis added by *Grier* court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.][In a footnote at this point, the Court states: "*Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, F.. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)"]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held a Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extended] well beyond matters relating solely to the management of the internal affairs of the agency itself[,]' and embodied 'a rule of general application significantly affecting the male prison population' in its custody. . . .

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception. . . ."(1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.

43. In **1990 OAL Determination No. 18** (Board of Podiatric Medicine, December 26, 1990, Docket No. 90-001) CRNR 91, No. 2-Z, page 82 (see endnote 3 with respect to all references to *Grier* in the following quotation in that it has been disapproved on other grounds in *Tidewater*), OAL discussed an unusual California Court of Appeal case which had been cited by the rulemaking agency: *Americana Termite Co. v. Structural Pest Control Board ("Americana")* (1988) 199 Cal.App.3d 230, 244 Cal.Rptr. 693. *Americana* gave a very broad reading to the internal management exception:

"We . . . note that *Americana's* seeming inconsistency with the body of law on the subject of the "internal management" exception has been severely criticized. The court in *Grier v. Kizer* stated:

". . . Without citation to authority, the *Americana* court concluded

> the enforcement program was not a regulation but merely 'an internal enforcement and selection mechanism.' [Citation.]
>
> "Thus, the *Americana* court apparently concluded 'internal management' and 'enforcement' are synonymous. *Its reasoning is not fully developed.* The fact that a rule pertains to enforcement does not establish that it relates *only* to internal management." [Emphasis added.]

We further add that the term "internal management" cannot be logically equated with "enforcement." Such a view would mean that practically all agency rules would be exempt from the requirements of the APA since most rules can arguably be linked (if only tangentially) to the enforcement of law. The Legislature clearly had "enforcement" in mind when defining the term "regulation." Government Code section 11342, subdivision (b), reads:

> "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law *enforced* or administered by it . . . ." [Emphasis added.]

To equate "internal management" with "enforcement" also appears contrary to the holding in *Armistead*. The California Supreme Court, in *Armistead*, recognized the distinction between purely internal rules which merely govern an agency's procedure and rules which have *external impact* so as to invoke the APA.*[note 67 - Armistead, supra, 22 Cal.3d at pp. 203-204, 149 Cal.Rptr. at pp. 3-4.]* Certainly, rules of "enforcement" have external impact on licensees and members of the general public served by licensees.

Assuming arguendo that the holding of *Americana* can be reconciled with the Supreme Court case of *Armistead*, *Americana* is nonetheless unpersuasive since the facts of that case are easily distinguished from the circumstances presented in this Determination [involving the Board of Podiatric Medicine]."

The streambed alteration policies of the Department of Fish and Game, although they could linguistically be characterized as mere "enforcement" of the underlying statute, do in reality have substantial external impact on various segments of the public and thus cannot reasonably be deemed to fall within the internal management exception. See text following endnote 45.***

44. *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 206-207, 149 Cal.Rptr. 1; *Stoneham v. Rushen ("Stoneham I")* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 942-943, 107 Cal.Rptr. 596; *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 436, 440, 268 Cal.Rptr. 244 (see endnote 3: *Grier*,

disapproved on other grounds in *Tidewater*).

45. Title 5, U.S.C., section 553(a)(2).

46. SB 824 (1947/DeLap) initially provided that public contracts were exempt from the APA. This provision was amended out, and then SB 824 died in committee. A competing bill, AB 35, which did *not* exempt public contracts from the APA, was approved by the Legislature and chaptered as statutes of 1947, ch. 1425. Thus, exempting contracts from APA coverage was specifically considered by the Legislature, but such a provision was not included in the proposal that was ultimately enacted into law.

47. Federal law exempts "interpretative rules" from APA requirements. Title 5, U.S.C., section 553(b) provides in part:

> "Except when notice and hearing is required by statute, this subsection does not apply--
>
> > (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; . . . ."

48. **1991 OAL Determination No. 6**, p. 176 (Department of Developmental Services, October 3, 1991, Docket No. 90-008), CRNR 91, No. 43-Z, October 25, 1991, p. 1451.

49. "According to the leading case, *Stoneham v. Rushen*, the language quoted . . . [in 11342(g)] above creates a 'statutory exemption relating to *operational* forms.' (Emphasis added.) [In endnote: (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130.] An example of an operational form would be as follows: a form which simply provides an operationally convenient space in which, for example, applicants for licenses can write down information that existing provisions of law already require them to furnish to the agency, such as the name of the applicant."

"By contrast, if an agency form goes beyond *existing legal requirements*, then, under Government Code section 11342, subdivision (b), a formal regulation is '*needed to implement the law under which the form is issued.*' For example, a hypothetical licensing agency form might require applicants to fill in marital status, race, and religion--when none of these items of information was required by existing law. The hypothetical licensing agency would be making new law: i.e., 'no application for a license will be approved unless the applicant completes our application form, i.e., furnishes his or her name, marital status, race, and religion.' [Emphasis added.]"

"In other words, according to the *Stoneham* Court, if a form contains 'uniform substantive' rules which are used to implement a statute, those rules must be promulgated in compliance with the APA. On the other hand, a 'regulation is *not* needed to implement the law under which the form is issued' (emphasis added) insofar as the form in question is a simple operational form limited in scope to *existing* legal requirements."

"In sharp contrast, the Agency Response reads section 11342 as exempting from the APA 'any' form prescribed by a state agency. This reading of section 11342 is too broad."

"An interpretation of the forms language in section 11342 which permits agencies to avoid APA rulemaking requirements by the simple expedient of typing regulatory material into a form would lead to absurd consequences. There would be no limit to the degree to which agencies would be able to avoid public notice and comment, OAL review, and publication in the California Code of Regulations. Read in context, and in light of the authoritative interpretation rendered by the *Stoneham* Court, section 11342 cannot be reasonably interpreted in the broad fashion proposed by the Agency Response."[endnote omitted.] **1993 OAL Determination No. 5**, (State Personnel Board, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register (CRNR) 94, Volume 2-Z, p.105; typewritten version at p. 266. It is not plausible that the *Armistead* court would have reached a different conclusion and *upheld* the employee resignation rule involved in that case if the Personnel Board had simply thought to incorporate the rule in a form or form instruction.

50. **1990 OAL Determination No. 16**, p. 496 ((Department of Personnel Administration, December 18, 1990, Docket No. 89-023), CRNR 91, No. 1-Z, p. 40).

51. *Stoneham v. Rushen* (*"Stoneham I"*) (1982) 137 Cal.App.3d 729, 737-38, 188 Cal.Rptr. 130, 135-36.

52. *Id.*, 137 Cal.App.3d 729, 736, 188 Cal.Rptr. 130.